

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

WAYNE J. SAND & GRAVEL, INC.
9455 Buena Vista Road
Moorpark, CA 93021

Employer

Docket No. 01-R5D2-3391

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by Wayne J. Sand and Gravel, Inc. (Employer).

JURISDICTION

On May 10, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted a planned inspection at a place of employment maintained by Employer at 9455 Buena Vista Road, Moorpark, California (the site). On May 14, 2001, the Division issued a citation to Employer alleging a serious violation of section 6985(d) [sand and gravel excavation] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations¹ and proposed a civil penalty of \$3,150.

Employer filed a timely appeal and a hearing was held before an Administrative Law Judge (ALJ) of the Board who issued a decision on June 13, 2003 finding a violation of the safety order.

On July 16, 2003, Employer served its petition for reconsideration on the Division, Southern and Northern California Legal Units by Federal Express but did not deliver the petition to the Appeals Board.

On August 5, 2003, the Division filed an answer to the petition. Because no petition for reconsideration had been received by the Board, Board staff contacted Employer to inform it of the error. On August 15, 2003, the Board received the original signed petition with no sufficient proof of service or delivery upon the Board within the 35 day period.

¹ Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

ISSUE

Does the Board have jurisdiction to consider a petition for reconsideration that was served on the parties in a timely manner but not filed with the Board until after the statutory deadline?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

Labor Code section 6614(a) sets forth the deadline for filing a petition for reconsideration from an Administrative Law Judge's (ALJ) decision or an order of the Board:

At any time within 30 days after the service of any final order or decision made and filed by the appeals board or a hearing officer, any [aggrieved] party . . . may petition the appeals board for reconsideration Such petition shall be made only within the time and in the manner specified in this chapter.

A regulation of the Board provides that: "[t]he petition for reconsideration shall be filed at the Appeals Board in Sacramento, California, and shall be deemed filed on the date it is delivered or mailed to the Appeals Board." (8 Cal. Code Regs. § 390(a).)

In the present case, the decision of the ALJ was served by mail on the parties on June 13, 2003. Because the decision was served by mail, the time for filing a petition for reconsideration was extended by 5 days. (See 8 Cal. Code Regs. § 348(c).) Thus, the last day to file a petition for reconsideration challenging the decision was July 18, 2003, which was 35 days after service of the decision. Employer's petition for reconsideration was mailed to the Board on August 14, 2003,² which is 27 days after the statutory deadline.

Longstanding Board precedent establishes that the Board does not have jurisdiction to accept the petition. The Board has consistently held that the requirement that a petition for reconsideration be mailed or delivered to the Board within 30 days of the issuance of the decision or order to be reconsidered is jurisdictional and the Board is without power to enlarge the time for the filing of a petition for reconsideration. (*Unocal Corporation*, Cal/OSHA App. 92-639, Denial of Petition for Reconsideration (May 13, 1993) citing *Dalton Construction Company*, Cal/OSHA App. 83-987, Denial of Petition for Reconsideration (Feb. 7, 1985).) Both *Unocal* and *Dalton Construction* addressed the same issue as in this case and determined that the Board cannot consider a petition for reconsideration timely served on the parties but not filed with the Board within the statutory period. The Board stated in those

² This is the date indicated on the Federal Express receipt. (See 8 Cal. Code Regs. § 348(b).)

cases that the fact that the petitioner had served the opposing party was deemed to be “inconsequential” for the purposes of the requirement of filing a petition for reconsideration with the Board. (*Unocal Corporation*, at p.3.) When, as here, there is insufficient proof of “mailing or delivery” to the Board within the statutory period, we cannot deem timely service of the petition upon opposing parties as a timely filing of the petition with the Board.

The deadline for filing a petition for reconsideration is jurisdictional and even a petition filed one day beyond the deadline must be denied. (See *Beutler Heating & Air Conditioning, Inc.*, Cal/OSHA App. 93-2220, Denial of Petition for Reconsideration (Mar. 16, 1995) and *Edwin D. Chapman*, Cal/OSHA App. 81-331, Denial of Petition for Reconsideration (Oct. 1, 1981).)

The courts and other adjudicatory agencies have reached the same conclusion when interpreting similar statutory filing deadlines. It is well established that if a time limitation for filing a document with an agency is jurisdictional, and a document is filed beyond the time limit, neither the agency nor a court may grant relief since they lack jurisdiction over the matter. See *Humbert v. Castro Valley County Fire Protection Dist.* (1963) 214 Cal.App.2d 1, 9.)

The Board finds that Employer did not file its petition for reconsideration within the statutorily prescribed time. Therefore, the Board is without jurisdiction to review the decision issued June 13, 2003. Accordingly, the decision is final and not subject to review by any court or agency.³

DECISION

Based upon the above, the petition for reconsideration is denied as untimely. The Board has no jurisdiction to reconsider the now final decision, denying Employer’s appeal.

MARCY V. SAUNDERS, Member
GERALD PAYTON O’HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: October 2, 2003

³ Section 390.3(a) states: “[i]f within 30 days of the filing of an order or decision no petition for reconsideration has been filed, and no reconsideration has been ordered on the Appeals Board’s own motion, the order or decision is a *final order* of the Appeals Board and not subject to review by any court or agency.” (Italics added.)